

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

LINDSAY KAMAKAHI, an individual, on
behalf of herself and all others similarly
situated,

Plaintiff,

vs.

AMERICAN SOCIETY FOR
REPRODUCTIVE MEDICINE, et al.,

Defendants.

Case No: C 11-01781 SBA

**ORDER GRANTING MOTION TO
CONSOLIDATE; GRANTING
MOTION FOR APPOINTMENT OF
INTERIM LEAD CLASS
COUNSEL; AND DENYING
MOTION FOR APPOINTMENT OF
AN EXECUTIVE COMMITTEE**

Docket 48.

The parties are presently before the Court on Plaintiff Lindsay Kamakahi's ("Plaintiff") motion to consolidate the instant action, Kamakahi v. American Society for Reproductive Medicine, et al., C 11-01781-SBA ("Kamakahi"), with the related action Levy v. American Society of Reproductive Medicine, et al., C 11-03803-SBA ("Levy") under Rule 42 of the Federal Rules of Civil Procedure. Dkt. 48. Also before the Court are Plaintiff's motion for appointment of interim lead class counsel under Rule 23(g) of the Federal Rules of Civil Procedure, and motion for appointment of a three-firm Executive Committee to prosecute this action. Id. No Defendant has filed an opposition. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS the motion to consolidate, GRANTS the motion for appointment of interim lead class counsel, and DENIES the motion for appointment of a three-firm Executive Committee to prosecute this action, for the reasons stated below. The

1 Court, in its discretion, finds this matter suitable for resolution without oral argument. See
2 Fed.R.Civ.P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

3 **I. DISCUSSION**

4 **A. Motion to Consolidate**

5 Plaintiff argues that consolidation of the instant action and the related Levy action is
6 appropriate because the actions are substantially similar and raise nearly identical questions
7 of law and fact, and therefore consolidation will serve the interests of efficiency and
8 judicial economy.

9 If actions before the court involve a common question of law or fact, the court may
10 consolidate the actions. Fed.R.Civ.P. 42(a). A court has broad discretion in determining
11 whether to consolidate actions pending in the same district. See Investors Research Co. v.
12 U.S. Dist. Court for Cent. Dist. of Cal., 877 F.2d 777, 777 (9th Cir. 1989). In determining
13 whether or not to consolidate cases, the court should “weigh the interest of judicial
14 convenience against the potential for delay, confusion and prejudice.” Zhu v. UCBH
15 Holdings, Inc., 682 F.Supp.2d 1049, 1052 (N.D. Cal. 2010).

16 Having reviewed the complaints filed in both actions, the Court concludes that
17 consolidation is appropriate in light of the substantial similarity between the two actions.
18 The Plaintiff in both actions seeks to represent a class against American Society for
19 Reproductive Medicine (“ASRM”) and Society for Assisted Reproductive Technology
20 (“SART”), and all fertility clinics and egg donor agencies that agreed to comply with
21 SART/ASRM rules regarding egg donor compensation, excluding entities located in
22 Indiana. Compl. ¶ 20, Dkt. 1; Levy action Compl. ¶ 23, Dkt. 1. In addition, both actions
23 are brought on behalf of a class consisting of all women who during the preceding four
24 years sold human eggs to any Defendant class member for assisted reproductive purposes.
25 Compl. ¶ 13; Levy action Compl. ¶ 17. Finally, both complaints assert one cause of action,
26 alleging that Defendants entered into a price fixing agreement to suppress the price paid to
27 putative class members for human egg donor services in violation of Section 1 of the
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1 Sherman Antitrust Act, 15 U.S.C. § 1. Compl. ¶¶ 1, 106-110, Levy action Compl. ¶¶ 110-
2 114.

3 Accordingly, because the instant action and the related Levy action involve common
4 questions of law and fact, Plaintiff's motion to consolidate is GRANTED. The Court finds
5 that consolidation will serve the interests of efficiency and judicial economy. Pursuant to
6 Rule 42, Kamakahi v. American Society for Reproductive Medicine, et al., C 11-01781-
7 SBA and Levy v. American Society for Reproductive Medicine, et al., C 11-03803-SBA
8 shall be consolidated for all purposes into one action. The first-filed consolidated case,
9 Kamakahi, shall be the lead case. All future filings shall be filed under the caption and case
10 number Kamakahi v. American Society for Reproductive Medicine, et al., C 11-01781-
11 SBA.

12 **B. Motion for Appointment of Interim Lead Class Counsel**

13 Plaintiff requests that the Court appoint her counsel Finkelstein Thompson LLP and
14 Cafferty Faucher LLP as interim co-lead class counsel under Rule 23(g).

15 A district court "may designate interim counsel to act on behalf of a putative class
16 before determining whether to certify the action as a class action." Fed.R.Civ.P. 23(g)(3).
17 In making this determination, the court considers: "(i) the work counsel has done in
18 identifying or investigating potential claims in the action; (ii) counsel's experience in
19 handling class actions, other complex litigation, and the types of claims asserted in the
20 action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel
21 will commit to representing the class." Fed.R.Civ.P. 23(g)(1)(A). In addition, the Court
22 "may consider any other matter pertinent to counsel's ability to fairly and adequately
23 represent the interests of the class." Fed.R.Civ.P. 23(g)(1)(B).

24 The Court has reviewed the evidence submitted by Plaintiff and concludes that
25 Finkelstein Thompson LLP and Cafferty Faucher LLP possess sufficient experience,
26 knowledge of the applicable law, and resources to represent the putative class in this matter.
27 Mark Punzalan Decl., Exhs. A-B, Dkt. 48-1. Accordingly, Plaintiff's motion for
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1 appointment of interim lead class counsel is GRANTED. The Court appoints Finkelstein
2 Thompson LLP and Cafferty Faucher LLP as co-lead counsel in this consolidated action.

3 **C. Motion for Appointment of an Executive Committee**

4 Plaintiff requests that the Court appoint a three-firm Executive Committee to
5 prosecute this action, consisting of her counsel, Finkelstein Thompson LLP and Cafferty
6 Faucher LLP, and Plaintiff's counsel in the Levy action, Bursor & Fisher, P.A. In support
7 of this request, Plaintiff asserts that "Bursor & Fisher has a wealth of experience litigating
8 complex commercial and consumer class actions, including antitrust cases, and will be a
9 valuable member of the team prosecuting this case." Moreover, the "Executive Committee
10 will advance the common interests of Plaintiffs and the Class in the prosecution of the
11 consolidated action, and will work in conjunction with one another to ensure that the case is
12 effectively and efficiently prosecuted, and the interests of Plaintiffs and the proposed class
13 are best represented."

14 The Court concludes that Plaintiff has failed to demonstrate that the appointment of
15 a three-firm Executive Committee to prosecute this action is warranted. See Manual for
16 Complex Litig., § 10.221 (4th ed. 2004) ("Committees are most commonly needed when
17 group members' interests and positions are sufficiently dissimilar to justify giving them
18 representation in decision making."). First, there has been no showing that the interests and
19 positions of the putative class members represented by Bursor & Fisher, P.A in the Levy
20 action are sufficiently dissimilar to the interests and positions of the putative class members
21 represented by Finkelstein Thompson LLP and Cafferty Faucher LLP in the Kamakahi
22 action to justify giving Bursor & Fisher, P.A representation in decision making. Plaintiff,
23 for her part, has not identified any diverse interest among the parties that would support the
24 appointment of a committee of counsel. See id. § 10.221 (in appointing counsel in complex
25 litigation, a court may consider, among other factors: "whether designated counsel fairly
26 represent the various interests in the litigation—where diverse interests exist among the
27 parties, the court may designate a committee of counsel representing different interests").
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1 Second, there has been no showing that the interests of efficiency and economy are
2 best served by appointing a three-firm Executive Committee. Plaintiff has not
3 demonstrated that a committee of counsel is necessary to effectively and efficiently
4 prosecute this action, while avoiding unnecessary costs and duplication of efforts. See
5 Manual for Complex Litig., § 10.221 (noting that “Committees of counsel can sometimes
6 lead to substantially increased costs”). Accordingly, Plaintiff’s request for appointment of
7 a three-firm Executive Committee to prosecute this action is DENIED.

8 The Court notes that appointed co-lead counsel, as the attorneys charged with
9 formulating and presenting positions on substantive and procedural issues during this
10 litigation on behalf of other counsel and their clients, are, of course, free to consult with
11 Bursor & Fisher, P.A on all significant litigation decisions and to divide case
12 responsibilities and costs as they see fit, including tasking Bursor & Fisher, P.A. with
13 litigation assignments. However, while it may be appropriate, and even beneficial, for the
14 firms to divide work among themselves, counsel should be mindful that this Court will
15 ultimately scrutinize the reasonableness of any application for attorneys’ fees and costs. As
16 such, counsel should strive to avoid unnecessary costs and duplication of efforts.

17 **II. CONCLUSION**

18 For the reasons stated above, IT IS HEREBY ORDERED:

19 1. Plaintiff’s motion to consolidate is GRANTED. Kamakahi v. American
20 Society for Reproductive Medicine, et al., C 11-01781-SBA and Levy v. American Society
21 for Reproductive Medicine, et al., C 11-03803-SBA shall be consolidated for all purposes
22 into one action. All future filings shall be filed under the caption and case number
23 Kamakahi v. American Society for Reproductive Medicine, et al., C 11-01781-SBA.

24 2. Plaintiffs shall file a consolidated complaint within thirty (30) days from the
25 date of this Order. Defendants shall file a responsive pleading in accordance with Rule 12
26 of the Federal Rules of Civil Procedure.

1 3. Plaintiff's motion for appointment of interim lead class counsel is
2 GRANTED. The Court appoints Finkelstein Thompson LLP and Cafferty Faucher LLP as
3 co-lead counsel in this consolidated action.

4 4. Plaintiff's motion for appointment of a three-firm Executive Committee to
5 prosecute this action is DENIED.

6 5. In light of the Court's ruling on the motion to consolidate, the motion to
7 dismiss (Dkt. 33) is DENIED as MOOT.

8 6. This Order terminates Docket 33 and Docket 48.

9 IT IS SO ORDERED.

10 Dated: 3/13/12


SAUNDRA BROWN ARMSTRONG
United States District Judge